

Office Memorandum • UNITED STATES GOVERNMENT

TO : FILES

DATE: 16 November 1948

FROM : STATINTL

SUBJECT: Auto Repair Contract - Additional Work

1. The Contracting Section has requested our opinion regarding the legal propriety of including one additional car under an existing contract for repairs and services to certain Agency vehicles. The vehicles are listed in a referenced list attached to the contract and total about thirty-four (34) cars, all but three of which are Fords. The remaining are Mercurys. A new car has now been acquired, and the Contracting Officer wishes to add it to this list.

2. Primarily, the question for consideration here is the possible violation of the requirements of Section 3709, Revised Statutes, which provides:

"All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals. R.S. Section 3709."

3. In addition to the exceptions indicated in the Statute itself (i.e., personal services and emergencies), advertising has not been considered necessary where a specific statutory exemption exists or where it would serve no useful purpose. The Comptroller has also read into the Statute the additional qualification of reasonableness or magnitude of the change in the contract. Thus, in 5 Comp. Gen. 508, (512), he states:

"In general, an existing contract may not be expanded so as to include additional work of any considerable magnitude, without compliance with Section 3709, Revised Statutes, unless it clearly appears that the additional work was not in contemplation at the time of the original contracting and is such an inseparable part of the work originally contracted for as to render it reasonably impossible of performance by other than the original contractor."

and, referring to this same opinion, he says in 5 Comp. Gen. 642, (644-5):

"There may be instances after a contract has been duly and lawfully entered into on behalf of the United States for the doing or acquiring of things authorized by law to be done or acquired, where a change or modification in the contract specifications is essential and in the interest of the United States. In such instances, if the changes materially alter the character or scope of the requirements under the original contract, said contract should be terminated in the interest of the Government and bids should be solicited on the work as changed. If the changes do not materially affect the requirements under the original contract but involve rather an addition thereto, the rule with reference to the procedure to be followed is as stated in decision of January 21, 1926, 5 Comp. Gen. 508."

The basic legislative intent behind Section 3709 is well explained in 18 Comp. Gen. (643):

"It has been frequently held by the courts and by the accounting officers of the United States that the provisions of the statute are designed to give all persons equal right to compete for Government business; to secure to the Government the benefits which flow from competition; to prevent unjust favoritism by representatives of the Government in making purchases on public account; and to prevent collusion and fraud in procuring supplies or letting contracts."

Considering the purpose behind the provision and accepting the lead of "materiality of the change" indicated by the Comptroller, it is not believed that any exception would be taken by the General Accounting Office if the additional car were added to the list of the original contract provided the car is the same manufacturing make as those included under the original contract, and the inclusion is acceptable to the contractor.

4. The Contracting Officer is being advised accordingly.

STATINTL